Supreme Court, U.S.
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No. 94-127

In The

Supreme Court of the United States

October Term, 1994

GLENN D. THESENVITZ, et al.,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a participant in an ERISA pension plan may obtain benefits beyond those authorized by the unambiguous terms of the written plan, on a federal common law theory of equitable estoppel, in the absence of intent to deceive or other circumstances tantamount to fraud?

PARTIES TO THE PROCEEDING

The petition identifies the petitioners as Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberlein (or Heberline), James E. Berwick, Donald E. Palmer, Ferrin K. Walker, and Norma Stark as personal representative of the Estate of Lawrence Stark. We understand that Mr. Walker is now deceased.

The petition identifies the respondents as (1) Kaiser Engineers Hanford Company, (2) Kaiser Engineers Retirement Plan, and (3) Administrative Committee for the Kaiser Engineers Hanford Retirement Plan. Only the company (now known as ICF Kaiser Hanford Co.) is a proper respondent in this Court. The district court entered judgment in favor of the other two defendants, App. A-13, and petitioners did not appeal. App. A-10. Consequently the Plan and the Administrative Committee were not parties to the appeal before the Ninth Circuit, and they are not properly before this Court.

RULE 29.1 LISTING

Respondent ICF Kaiser Hanford Co. is a wholly-owned subsidiary of ICF Kaiser International, whose shares are listed on NASDAQ.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, App. A-15 *et seq.*, is reported at 796 F. Supp. 447 (E.D. Wash. 1992). The memorandum opinion of the Ninth Circuit, App. A-6 *et seq.*, is unpublished; the disposition appears in the table at 15 F.3d 1090 (9th Cir. 1994).

STATEMENT OF THE CASE

Petitioners elected to take early retirement from the Kaiser Engineers Hanford Company. They did so on the basis of estimates by the company's pension department

as to the amount of their monthly benefits under the terms of the Company's pension plan. App. A-9.

Unfortunately these estimates were erroneous, and the errors were not caught until some 12 to 18 months after the petitioners' retirements. During this period petitioners received payments that were substantially higher than those to which they were entitled under the terms of the written plan. App. A-9.

When the errors were discovered, the plan administrator reduced petitioners' pensions to the levels authorized by the plan, as it was required to do.[1] App. A-24. Petitioners brought suit in the United States District Court for the Eastern District of Washington to obtain the higher level of benefits that they had originally received in error. The district court had jurisdiction under 29 U.S.C. § 1132.

The district court found that the reduced pensions were all that petitioners were entitled to receive under the terms of the written plan. App. A-38 to A-39. Accordingly the court dismissed the claims against the plan and its administrative committee. App. A-14. Petitioners did not appeal. App. A-10.

The district court also found that the company did not deliberately mislead the petitioners as to the amount of their benefits. App. A-22, A-28 n.3. However the petitioners were nevertheless allowed to recover against the company on a theory of equitable estoppel, under the

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[1] Title 29 U.S.C. § 1104(a)(1)(D) requires that an ERISA plan be administered in accordance with the terms of the governing documents.

federal common law. App. A-39. The company appealed. The court of appeals had jurisdiction of the appeal under 28 U.S.C. § 1291.

The Ninth Circuit reversed on the authority of its earlier decision in *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), which presented similar facts. App. A-11 to A-12. On the basis of this Court's decision in *Mertens v. Hewitt Associates*, 124 L. Ed. 2d 161 (1993), *Watkins* held that ERISA participants may not obtain benefits in excess of those authorized by a written plan, on a theory of equitable estoppel or otherwise, as there is no statutory authority for such claims. App. A-98 to A-105.

REASONS FOR DENYING THE WRIT

The decision below is correct, and is compelled by this Court's decisions in *Mertens v. Hewitt Associates*, 124 L. Ed. 2d 161 (1993), *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

There is no conflict among the circuits as to the availability of estoppel on the facts of this case, and there is no conflict among the circuits as to the impact of *Mertens* on common-law estoppel claims in ERISA cases generally. Other circuits that expressed limited receptivity to such claims prior to *Mertens* have not re-examined their position in light of *Mertens*. Even in these circuits, petitioners would not have prevailed on the facts of this case. Thus there is no conflict requiring resolution by this Court.

ARGUMENT

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), this Court held that the "carefully integrated civil enforcement provisions" of ERISA are "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Two years later, in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), the Court repeated that the express civil remedies of 29 U.S.C. § 1132(a) "were intended to be exclusive."

Some courts of appeals took this Court at its word. They held that there was no federal common-law remedy in the nature of equitable estoppel in ERISA cases.[2] These courts also noted that ERISA's requirement that plans be in writing, with formal amendment procedures, 29 U.S.C. § 1102, precluded use of oral representations or informal written communications to expand or modify the benefits due participants under the terms of the written plan.

As petitioners note, Pet. 10-14, other circuits were reluctant to rule out equitable estoppel claims altogether. However virtually all of these cases preceded this Court's decision in *Mertens v. Hewitt Associates, Inc.*, 124 L. Ed. 2d 161 (1993).[3]

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[2] *E.g., Alexander v. Anheuser-Busch Companies, Inc.*, 990 F.2d 536 (10th Cir. 1993); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990).

[3] Except in the Ninth Circuit, the few estoppel cases decided after *Mertens* have not considered the effect of *Mertens* on the prior law of the circuit. For instance, *Tregoning v. American Community Mutual Ins. Co.*, 12 F.3d 79 (6th Cir. 1993), cited by petitioners, rejected the estoppel claim as not even meeting

Mertens removed all doubt as to the availability of implied or common-law causes of action in ERISA cases. *Mertens* made clear that plaintiffs in such cases must find express statutory authorization for their claims. "The issue is whether the statute affirmatively *authorizes* such a suit." *Id.*, 124 L. Ed. 2d at 169 n.5. "The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Id.*, at 172.

In the court below, petitioners asserted that authorization for their claims could be found in 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3)(B). App. A-11. However the former is expressly limited to claims for benefits due under the terms of the plan.[4] The latter is limited to claims for "appropriate equitable relief"[5] – a term that *Mertens* authoritatively construed to mean injunctions, constructive trusts, and similar remedies as opposed to damages. 124 L. Ed. 2d, at 169.[6] Neither provision authorizes the relief sought by petitioners.

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the requirements of the circuit's pre-*Mertens* decisions. The *Tregoning* court did not have occasion to consider the impact of *Mertens* on those decisions, and it did not do so.

[4] "[A civil action may be brought by a participant or beneficiary] to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[5] "[A civil action may be brought] by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief (i) to redress such violations [of ERISA] or (ii) to enforce any provisions of this subchapter or the terms of the plan."

[6] In addition, as in *Mertens*, here there was no violation either of ERISA or of the terms of the plan, as 29 U.S.C. § 1132(a)(3)(B) expressly requires.

In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), the court below correctly held that *Mertens* required modification of the circuit's pre-*Mertens* decisions that had shown a limited willingness to accept estoppel claims in ERISA cases as a matter of federal common law. *See* App. A-98 to A-105. The other circuits have yet to consider the effect of *Mertens* on such claims. There is no conflict on that point.

Even before the decision in *Mertens*, there was no conflict on the facts of this case. Most of the expressions on which petitioners rely were simply cautious statements by a court limiting its holding to the facts before it, or remanding for development of a fuller factual record before deciding the validity of plaintiff's legal theory.[7] None of the cases cited in the petition actually upheld an award of damages to participants under a theory of estoppel.

Some of these cases stated, frequently in dictum, that equitable estoppel might be available in cases of "intentional deceit" or conduct "tantamount to fraud";[8] or that although equitable estoppel could not expand participants' rights under an unambiguous plan, it might be available to prevent a plan administrator from adopting

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[7] In particular, *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 126 L. Ed. 2d 586 (1993), remanded the estoppel claim "without in any way suggesting a view on the merits." 994 F.2d at 136.

[8] *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 489 (2d Cir. 1988).

inconsistent interpretations of an ambiguous plan;[9] or that equitable estoppel might be available in cases involving unfunded welfare plans, as opposed to actuarially funded pension plans.[10]

Even if these expressions remain viable after *Mertens*, which we doubt, none of them would justify a finding for plaintiffs here. This case seeks benefits in excess of those authorized by an existing written pension plan, not an unfunded welfare plan or an unwritten plan or a plan to be adopted at some future time. The error in calculating petitioners' pensions resulted from a confusion of monthly and annual figures in a worksheet, and not from any ambiguity in the written plan. App. A-21 to A-22. The trial court expressly found that the company had no intent to deceive. App. A-22. Thus respondents would prevail even under the cases from other circuits cited by petitioners. On the facts of this case, there is no conflict.

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[9] *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468 (11th Cir. 1993); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992).

[10] *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990). *See also Elmore v. Cone Mills Corp.*, 23 F.3d 855, 868-869 (4th Cir. 1994) (concurring opinion) (although estoppel principles cannot be used to effect a modification of an existing ERISA plan, a company may be estopped by its promise as to the terms of a plan to be adopted in the future).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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